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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN AND ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

VS.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,

Appellees.

On Appeal From The Supreme Court of the State of California

BRIEF OF CALIFORNIA HOUSING COUNCIL, INC. AS *AMICUS CURIAE*

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BRIEF OF CALIFORNIA HOUSING COUNCIL, INC. AS *AMICUS CURIAE*

This brief is submitted with the written consent of all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The California Housing Council, Inc. (the "Council") is a nonprofit association of owners, managers and developers of rental property. The 125 individual and organizational members of the Council own or manage approximately 300,000 rental housing units in California. Since its formation in 1975, the Council has been continously and extensively involved in rent control issues at the federal, state and local levels.

The issue in this case, whether the Sherman Act preempts the City of Berkeley's rent control ordinance, is of major importance to the Council. Although in the long run the burden of rent control falls principally on would-be renters denied access to housing, the initial burden falls directly on those who own, operate, and develop that housing. The Council believes that its experience and perspective will materially aid this Court in understanding the impact of displacing price competition in rental housing with municipal price fixing.

SUMMARY OF ARGUMENT

Congress, through the Sherman Act, determined that a system of economic competition among suppliers of goods would best serve the nation's long-term economic interests. The residents of the City of Berkeley, California, decided through the initiative process that, instead of competition, a system of price controls should govern the provision of most rental housing.

First, the Court must decide whether Berkeley can ignore the Sherman Act's mandate of competition.

More than forty years ago in *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that Congress did not intend states, as sovereign entities, to be subject to the Sherman Act. However, this Court has ruled repeatedly over the past decade that a municipality is not sovereign and may not claim the state action exemption unless it is acting pursuant to a "clearly expressed" state policy. The State of California has not expressed a policy authorizing municipal rent control.

The court below discarded this Court's prior decisions and ruled that Berkeley's rent control ordinance overrides the Sherman Act's mandate of competition on the ground that a municipality's general police power protects such ordinances as long as they are even-handed. This standardless approach turns the Supremacy Clause of the Constitution on its head.

Under principles long settled by this Court, Berkeley is subject to the Sherman Act until such time as the California legislature, or Congress itself, decides to confer antitrust exemption.

Second, the Court must decide whether the Berkeley rent control ordinance violates the Sherman Act.

Had the renters of Berkeley gathered together in a broad agreement to restrict price competition for rental housing, their agreement would constitute a classic *per se* violation of the Sherman Act. It is no less so merely because they have through the initiative process caused their city to impose and enforce price restrictions on rental housing.

Rent control imposed on landlords is no less objectionable than a minimum price agreement among renters. Rent control reduces the flow of capital into rental housing, discourages maintenance and new construction, and retards the mobility of labor by subsidizing those who stay in place. The economic distortions caused by rent control may serve the parochial interest of those who secure them, but they disserve the national objective of a free and robust competitive economy. Under classic antitrust precedent such an ordinance is *per se* unlawful.

To permit subjective judicial balancing of local social goals to erode the mandates of the federal antitrust laws will destroy the predictability of the antitrust laws and blur the lines of responsibility among Congress, the sovereign states, and the courts. Requiring municipalities to abide by the antitrust laws where they are not exempted by their sovereign states does not impede the proper functioning of local government.

I. The California Supreme Court Should Have Applied Traditional Sherman Act Analysis To The Berkeley Rent Control Ordinance.

A. Berkeley's ordinance is not exempt from the Sherman Act.

Congress has made competition the law of the land.

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

A municipality is fully subject to the Sherman Act unless the legislature of the state in which the city lies exempts it pursuant to a "clearly expressed state policy," *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1717 (1985).

California has not expressed a policy to displace competition in private rental housing. Article XI, Section 7 of the California Constitution, which empowers municipalities to "make and enforce within [their] limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws," is no more a policy to displace competition than was the home rule authority that this Court held in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), was insufficient to confer the state action exemption.

Congress could exempt municipalities from the antitrust laws. Indeed, last year Congress considered six bills that would have altered traditional antitrust rules as applied to municipalities. H.R. Rep. No. 965, 98th Cong., 2d Sess. *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602. One proposal would have made municipal immunity coextensive with state immunity, *id.* at 13, another would have exempted non-commercial activity, *id.* at 14, and still another

would have enacted a loose balancing test of the sort adopted by the California Supreme Court, *id.* at 15-17.

After receiving extensive testimony and giving careful consideration to these bills, Congress found no warrant to exempt or to create special substantive antitrust rules for municipalities.

> If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary competitive injury, it would simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.

Id. at 18. Significantly, Congress concluded that any change in the substantive antitrust rules ran the "risk of varying and uncertain application by the courts." *Id.*

B. Under the doctrine of federal supremacy the California Supreme Court cannot ignore the Sherman Act's unequivocal policy favoring competition.

Contrary to the Sherman Act's clear mandate of competition, the California Supreme Court patched together a formula from several lines of constitutional and statutory cases to test the legality of Berkeley's ordinance. Specifically, it held that

> if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it *must be upheld* against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

Fisher v. City of Berkeley, 37 Cal. 3d 644, 675 (1984); Appendix A to Jurisdictional Statement at A-31 (footnotes omitted) (emphasis added).

The California court's formula is striking in its departure from the Sherman Act's focus on competition. The California court would require only that a local law be weighed against what it delicately styles an "impact on federal antitrust policies" — in plain words, a violation of the Sherman Act.

Such an approach might be appropriate where the municipality attempts to regulate a subject on which Congress has not spoken. For example, where the local regulatory action is alleged to violate the Commerce Clause, the Court has engaged in a balancing of interests. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

But where a local ordinance conflicts with a specific and explicit federal statute such as the Sherman Act, the ordinance must be struck down. Congress has spoken loudly, clearly, and repeatedly in favor of competition. It has left no room for balancing price competition against a municipality's police power interests.

The California formula turns the Supremacy Clause on its head and *subordinates* the Sherman Act to any "legitimate" police power interest. In fact, the California court permits the Sherman Act's "mandate of competition" to be carried out *only* when it does not in any way impede full achievement of the local purpose. Its ruling that prices fixed by Berkeley's ordinance are justified by local policy goals is "nothing less than a frontal assault on the basic policy of the Sherman Act. . . . [That] statutory policy precludes inquiry into the question of whether competition is good or bad." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978).

II. Berkeley's Rent Control Ordinance Constitutes A *Per Se* Violation Of The Sherman Act.

A. An arrangement that fixes prices is *per se* unlawful.

As this Court has repeatedly recognized: " 'Price is the central nervous system of the economy' . . . and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. at 692, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) and *United States v. Container Corp.*, 393 U.S. 333, 337 (1969). Any arrangement "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 223.

The harm lies not in the purpose of the price fixer but in the effect of price fixing on competition, since "[t]he heart of our national economic policy long has been faith in the value of competition." *National Society of Professional Engineers v. United States*, 435 U.S. at 695, quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950). It has been established for almost ninety years that the "reasonableness" of a fixed price or its possible justifications have no bearing on the appropriateness of applying the *per se* rule. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 & n.23 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *National Society of Professional Engineers v. United States*, 435 U.S. at 692-96; *Socony-Vacuum Oil Co. v. United States*, 310 U.S. at 226 n.59; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 339-41 (1897). Whether prices are imposed by a bar association on lawyers, *see Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), by doctors voluntarily upon themselves, *see Arizona v. Maricopa County Medical Society*, *supra*, by manufacturers in secret agreement, *see United States v. Socony-Vacuum Oil Co.*, *supra*, or by a city on local landlords, fixed prices are all *per se* illegal.

B. Berkeley's rent control ordinance fixes prices for rental housing.

The Berkeley ordinance fixes prices at 1980 levels, with certain adjustments. Had the residents of Berkeley, as renters, conspired and agreed as a group to the maximum prices that they would pay for rental housing, no one could dispute that such agreement would constitute a *per se* violation of the Sherman Act. The fact that the residents of Berkeley chose the initiative process and the municipal government as the vehicles for implementing and enforcing this "agreement" in no way lessens its *per se* nature.[1]

The power of the City of Berkeley as a governmental entity to compel compliance by all landlords with a schedule of maximum prices changes the efficient workings of the

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[1]In fact, the municipal involvement here makes the effect on competition even more pernicious than the typical price-fixing conspiracy, since it is impossible to "cheat on the cartel." *See* 2 P. Areeda & D. Turner, Antitrust Law ¶ 405(b)2 (1978). A consumer who might be willing to pay more than the fixed price for an apartment is effectively precluded from doing so because a landlord who accepts a higher payment is subject to the criminal penalties imposed by the ordinance.

Thus the detrimental effects on competition are far more severe here than in other instances where this Court has condemned maximum price fixing as *per se* illegal. *Cf. Arizona v. Maricopa County Medical Society, supra* (maximum-fee agreements between foundations and doctors held *per se* unlawful). Since the ordinance compels adherence to artificially depressed price levels under *penalty of law*, the arrangement here is completely coercive and absolutely forecloses competition. *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. at 357, 360 (Powell, J., dissenting) (noting lack of coercion in that case).

marketplace in the same manner as a horizontal conspiracy among competing landlords to maintain minimum prices. In a minimum price fixing case, the conspiracy raises price, resulting in a restriction of output. *See, e.g.*, 2 P. Areeda & D. Turner, Antitrust Law ¶¶ 403, 405 (1978). In the instant case, the City of Berkeley, in effect acting as a combination of all renters, artificially lowers prices, again resulting in a restriction of output. *See* R. Posner, Antitrust Cases, Economic Notes, and Other Materials 91-93 (1974). *See also* F. Scherer, Industrial Market Structure and Economic Performance 297-313 (2d ed. 1970); 2 P. Areeda & D. Turner, *supra*, ¶ 411(c). Even economists who argue that the harmful effects of maximum price fixing are overstated recognize that maximum price fixing which is a consequence of monopsony must be outlawed. *See* Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 904 (1981).[2]

By imposing rent controls, Berkeley destroys price competition among landlords "as effectively as if [the landlords] had formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (Holmes, J.). Thus the ordinance "mandates . . . conduct that necessarily constitutes a violation of the antitrust laws in all cases." *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

C. Berkeley's ordinance causes all of the adverse economic effects on competition, supply, capital investment, and innovation that led this Court to enunciate the *per se* rule against price fixing.

The adverse effects of rent control are well-documented. Study after study has shown that, when rent controls are

[2]"A price decrease coupled with a declining output would mark the onset of monopsony." *Id.*

imposed, maintenance of rental housing declines and reinvestment in major building systems declines. *See, e.g.*, 1 I. Lowry, Rental Housing in New York City 3-6 (1970) (Between 1960 and 1968, the dilapidated housing inventory increased by 44 percent, and the deteriorated stock by 37 percent in New York City. In 1968, 29 percent of all rent controlled units were deteriorated, as compared to 8 percent of the uncontrolled stock.); Hirsch, *From "Food for Thought" to "Empirical Evidence" about Consequences of Landlord-Tenant Laws*, 69 Cornell L. Rev. 604, 611 (1984). Because most of the costs of owning rental housing are the fixed costs of mortgage payments and taxes, an owner unable to obtain a market rent typically adjusts his costs by deferring maintenance. *See, e.g.*, Moorhouse, *Optimal Housing Maintenance Under Rent Control*, 29 Southern Econ. J. 93, 104 (1972).

Rent controls predictably and regularly reduce the supply of rental housing not only through loss of existing stock but through deterrence of new construction. Even an ordinance, such as Berkeley's, that exempts newly constructed housing discourages entry and new investment. Investors fear, and reasonably so, that the parochial political forces that enacted rent control will later expand its reach. *See, e.g.*, Hirsch, *supra*, at 609; Kalymon, *Apartment Shortages and Rent Control*, in Rent Control: Myths and Realities 231, 242 (E. Olsen ed. 1981) ("Investors in rental accommodations reduced their level of activity as a response to concerns over future permitted rent increases."); U.S. Dept. of Housing and Urban Development, Housing in the Seventies 161 (1974).

Finally, rent control retards the mobility of the work force by providing the deepest subsidy to long-term tenants regardless of their income levels. *See, e.g.*, Achtenberg, *The Social Utility of Rent Control*, in Housing Urban Amer-

ica 459, 466 (J. Pynoos ed. 1980) ("[R]ent controls place all existing occupants of controlled housing in a privileged position vis-a-vis other competitors for rent controlled space. . . . [O]utsiders may be forced to pay higher rents than they would have in the absence of controls. . . . Or, they may be economically barred from housing. . . ."); Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691, 694 (1983); Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 555 (1984) (rent control benefits present tenants at the expense of future tenants); Ault, *The Presumed Advantages and Real Disadvantages of Rent Control*, in Rent Control: Myths and Realities 53, 70 (E. Olsen ed. 1981) ("There are two ways in which rent control is likely to reduce mobility. First, to the extent that it reduces construction of new rental housing and leads to lower vacancy rates, residents will be deterred from moving by the increased difficulty of locating a vacant rental unit. . . . Also, residents of rent controlled units will be further discouraged from moving because in so doing they must forego the subsidy associated with tenure."). Those who would move into or within a rent controlled city may find fewer or no vacancies and may be faced with a requirement to pay black market "fees" to departing tenants. Muth, *supra*, at 696.

These pernicious economic effects that result from fixing rents are precisely those that persuaded this Court to enunciate a *per se* rule. Depending upon local demand and upon the adjustment mechanisms of particular ordinances, these effects may be more or less severe. And they may vary over time, depending upon the degree to which controlled rents are below or above those a free market would establish. But the very purpose of the *per se* rule against price fixing is to avoid "the burden of ascertaining from day to day whether [a

price] has become unreasonable through the mere variation of economic conditions." *United States v. Trenton Potteries Co.*, 273 U.S. at 398, *quoted in Arizona v. Maricopa County Medical Society*, 457 U.S. at 345. Accordingly, an ordinance that mandates the fixing of rents at pegged levels constitutes a *per se* violation of and is preempted by the Sherman Act.

D. The fact that this Court has not previously dealt with rent control does not reduce the propriety of applying the *per se* rule.

This Court has stated, on numerous occasions and in unequivocal terms, that "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Arizona v. Maricopa County Medical Society*, 457 U.S. at 349 (quoting *Socony-Vacuum Oil Co. v. United States*, 310 U.S. at 222). Because rent control is price fixing, "the paradigm of an unreasonable restraint of trade," *NCAA v. Board of Regents of University of Oklahoma*, 104 S. Ct. 2948, 2960 (1984), application of the *per se* rule is justified without inquiry into the special characteristics of the Berkeley housing market. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 349-51; *National Society of Professional Engineers v. United States*, 435 U.S. at 679.

III. Subjecting Municipalities To Traditional Antitrust Principles Preserves The Structure Of Our Federal System And Enhances Predictability; It Does Not Hinder Performance of Local Government.

The Sherman Act accommodates a local exercise of police power by granting an exemption when sovereign states establish a clearly articulated and affirmatively expressed state policy for such an exemption.

Thus, a state legislature can, if it wishes to do so, permit municipalities to replace traditional federal antitrust analysis with their own criteria. To require this kind of formal "delegation" of state authority is no mere technicality. It preserves the structure of our federal system by maintaining a clear allocation of responsibilities among Congress, the states, and courts (both federal and state). The contrary approach taken below would destroy that allocation and the predictability of the federal antitrust laws.

As this Court recently held in *Arizona v. Maricopa County Medical Society*:

> adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy . . . . By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application . . . we enhance the legislative perogative to amend the law.

457 U.S. at 354.

This Court has instructed non-sovereign entities to raise police power concerns that may involve otherwise impermissible trade restraints to their sovereign states, which speak for a less parochial interest. Thus, Berkeley is free to persuade the sovereign State of California to empower it to fix rents. Until that sovereign state so acts, the Sherman Act's "mandate of competition" has legal supremacy, and the citizens are protected from "the serious economic dislocation that could result if cities were free to place their own parochial interests above the nation's economic goals reflected in the antitrust laws." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13 (1978).

If California believes that rent control protection of the type here presented is more important than the benefits of competition, it can so determine, and some states have done so. *See, e.g.*, Conn. Gen Stat. Ann. § 7-148(b)-(f) (West Supp. 1985); Mass. Gen. Laws Ann. ch 842, §§ 1-1 to 1-14 (West Supp. 1985); N.Y. Unconsol. Laws §§ 8601-8610 (McKinney Supp. 1984). Indeed, the California legislature itself has authorized certain restraints of trade that might otherwise be objectionable under the Sherman Act. *See, e.g.*, Cal. Water Code § 31136 (West 1984) ("The district may prescribe, revise, and collect rates or other charges for the [garbage, waste, trash disposal] services furnished pursuant to this article.") In the absence of such an authorization, Congress has preempted all contrary state or local action, and a balancing between the Sherman Act and local concerns is out of place.

In the present case the California Supreme Court has assumed the authority to develop a standard for balancing federal antitrust policy against the self-proclaimed interests of the City of Berkeley. Prior decisions of this Court do not permit this obfuscation of the allocation of powers between the federal government and the sovereign states. Left standing, the decision below would abrogate the rights of state legislatures to grant or withhold antitrust exemption to or from local municipalities.

An injunction, which should properly issue in this case, will not disrupt the proper functions of local government in the City of Berkeley nor deplete its coffers. Last year Congress recognized that the continued application of the antitrust laws would in appropriate cases cause courts to strike down municipal ordinances; nonetheless it refused to modify the substantive antitrust standards applicable to municipalities. Instead Congress enacted the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat.

2750 (codified at 15 U.S.C. §§ 34-36 (1984)) barring actions for damages and the recovery of attorneys fees against municipalities. By such action Congress removed the concern that the application of the antitrust laws would cause municipalities financial hardship or inhibit their decision making.

CONCLUSION

For the foregoing reasons and those set forth by the appellants, the judgment of the California Supreme Court should be reversed.

Dated: August 1, 1985

Respectfully submitted,

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